RIGHT OF NATIONAL BANKS TO ACT AS TRANSFER AGENTS.*

A DESIRE on the part of corporations to facilitate transfers of shares of their stocks at markets distant from their home offices and to protect themselves against fraudulent over-issues of their stocks, erroneous duplications of outstanding certificates, and unwarranted transfers of shares of stock, has resulted in the very general custom of appointing trust companies and banks as transfer agents. A transfer agent acts for a corporation in the matter of making transfers of the ownership of stock of the corporation from one holder to another. This involves passing upon the legality and regularity of the assignments of title, noting the transactions upon the books of the corporation, canceling the old certificates, and issuing new certificates in their places.[1] The fact that competing State corporations very generally exercise this important function has led to a desire on the part of many national banks to do the same, and for some time it has been a mooted question whether national banks may act as transfer agents.

National banks derive their powers from two main sources: The National Bank Act [2] and the Federal Reserve Act.[3]

The National Bank Act [4] authorizes each national bank:

> "To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by

*In publishing this article the writer wishes to acknowledge the very valuable assistance of the late R. Keesee Blakey in digesting the many cases relating to the meaning of the terms "fiduciary capacity", "fiduciary relation", etc.

[1] HERRICK, TRUST COMPANIES, p. 345.

[2] Act of June 3, 1864, 13 Stat. L. 101; Act June 20, 1874, 18 Stat. L. 133.

[3] Act of Dec. 23, 1913, 38 Stat. L. 251, Comp. Stat. '16, § 9785 *et seq.*

[4] Act of June 3, 1864, § 8, U. S. Rev. Stat., § 5136.

obtaining, issuing, and circulating notes according to the provisions of this Title."

It has been held that under this provision a national bank can exercise only the powers expressly granted and those *necessarily incidental.*[5]

The provision of the Federal Reserve Act which is pertinent to this discussion is Section 11 (k), which broadened the powers of national banks by permitting them under certain conditions to exercise certain so-called trust company powers and thus to meet the competition of State corporations which transact a trust company business in addition to a regular banking business.

IMPLIED POWER.

It has been suggested that national banks may act as transfer agents without any specific statutory authority, on the ground that to do so is incidental to their banking business.

In an early Pennsylvania case, decided in 1846,[6] it was held that banks, although not specifically authorized to do so, have implied power to act as transfer agents, on the ground that such power is within the necessary implication of all bank charters, since long and unquestioned usage and custom prove that it is a necessary or usual function in the transaction of a banking business.

In a suit by the Bank of Kentucky against the Schuylkill Bank to recover for fraudulent issues of stock by the respondent while acting as transfer agent of the complainant, the respondent sought to repudiate the contract of employment as transfer agent on the ground that it was *ultra vires.* The court overruled the contention and held that the respondent had implied power to act as transfer agent. In the course of a long and learned opinion the President of the court said:

"The counsel of the defendants, claiming to represent the corporation, repudiate such a contract, as a thing pertaining to none of the proper facilities of a bank, and as discrepant with the spirit of its charter, which interdicts the corpora-

[5] Logan County National Bank *v.* Townsend, 139 U. S. 67.
[6] Bank of Kentucky *v.* Schuylkill Bank, 1 Pars. Eq. Cas. (Pa.) 180.

tion from buying or selling merchandise or stock. It is compared to a general mercantile agency, which the bank confessedly could not lawfully execute * * *. What is a transfer agency? It is a very harmless thing. It amounts to nothing more than the witnessing of the conveyance by one person to another, of personal property, viz. stock of an incorporated company; and in this case also to furnishing the purchaser a certificate of ownership of such stock, on the surrender of a previous certificate of like character held by the seller. This is very simple business, involving little or no risk or hazard; requiring nothing but ordinary care and fidelity in its performance. If the necessities of one bank require its stock to be transferable in another place, whether in the state of its creation or out of it, why cannot it ask aid of a correspondent bank that does all its other business in such a place? And why cannot such correspondent bank afford the aid required? In the charter of the Schuylkill Bank there is found nothing in terms forbidding the execution of such a friendly office, either to another bank of our own or of a sister state. For let it be remembered, that if it is unlawful for a bank to act as transfer agent for another, it is immaterial whether that other is a bank of our own or of another state. It is the want of congruity with banking functions that must make such a contract illegal; not the locality of the corporation for which the business is done. If *not expressly* forbidden, any implied interdiction must spring from not being a contract necessary or usual in the course of banking business. To this extent the implied power of making contracts resident in all corporations goes: Angell & Ames, 200. * * * So far as respects the corporation of the Schuylkill Bank, the material question is, whether a contract entered into by her directory agreeing to accept such an agency for another bank, was an *usual* and *accustomed contract* among banks, that maintain general business relations with each other. Such usages spring out of necessities, and are the best evidence of them. As the customs and usages of trade, are part and parcel of every mercantile contract, so a course of uniform usage, in favor of a particular course of business, prevailing among all banks, foreign and domestic, known to every business man, never called in question by government, never repudiated by stockholders, is stringent evidence of such a course of business being within the necessary implications of all bank charters. * * *"

After reviewing testimony showing that banks in Philadelphia and New York commonly acted as transfer agents for other banks, without their power to do so ever being questioned, the learned Judge continued:

"* * * At *this time* the Philadelphia Bank is acting as transfer agent of the debt of the United States, without, we presume, any idea being entertained by the bank directors that they have forfeited their charter by the acceptance of such an agency, or by the government that the corporate funds of the institution are not responsible for any fraud or neglect in the execution of the trust.

"* * * In this connection, the fact may be referred to, that the original and late Bank of the United States acted as a Commissioner of Loans for the government, and that the Bank of Pennsylvania is by law the transfer agent of the State stock. These duties were indeed *imposed* on these institutions as charter duties by government, but this manifests the general impression of the congruity of such functions with bank operations. In the face of an usage so broad and general, prevailing alike at home and abroad, it would be a harsh rule that would now declare such contracts void, and the charters of these banks forfeit, which have entered into them in good faith, resting on the universality of such contracts among banks, and the general acquiescence of government in this regularity. * * * In a case so circumstanced, if the court doubted this question, which they do not, they would follow the prudent precedent of Chancellor Kent, in the Silver Lake *v.* North, and leave the government to determine whether a forfeiture should be executed rather than in a collateral way decide a question of misuse by setting aside a just and *bona fide* contract; * * *

"* * * We have thus progressed in this investigation, until we have ascertained that the contract for the creation of the Philadelphia agency of the Bank of Kentucky was, if in fact entered into, a perfectly lawful contract in both contracting parties; inconsistent with no law of either state, and perfectly within the legitimate scope of authority possessed by the directors of both banks. * * *"

While the bank involved in that case was not a national bank and, therefore, the case might not be considered sufficient authority to justify the conclusion that the power to act as trans-

fer agent is a power which is *necessarily incidental* to the powers specifically conferred upon national banks by the National Bank Act, yet the case would seem at least sufficient to justify the conclusion that acting as transfer agent is a function which has been commonly performed by banks for many years and the performance of which is not at all incongruous with the ordinary business of banking.

EXPRESS POWER UNDER THE FEDERAL RESERVE ACT.

As will be demonstrated, however, it is one of the functions of transfer agents to provide additional safeguards with reference to the transfer of stocks and to render more certain the determination of who has title to shares of stock so transferred. In view of this fact, it is important that the right of a corporation selected as transfer agent to act in that capacity should not be open to question, and it is very desirable that it should have express power to do so. Without deciding whether national banks have implied power to act as transfer agents, therefore, it is desirable to determine whether they may acquire the power to act in that capacity under the provisions of section 11(k) of the Federal Reserve Act.

HISTORY AND PURPOSE.

Before attempting to construe that provision it is believed advisable to review very briefly its history and general purpose.[7]

When Congress was considering the enactment of the Federal Reserve Act, it found it to be very desirable, if not necessary, in order to accomplish the purposes of the Act, to permit State banks and trust companies to become members of the Federal Reserve System. Such institutions, however, possessed so much broader powers than national banks that they already enjoyed great advantages over national banks, and it was feared that if they were afforded the added advantages and prestige of membership in the Federal Reserve System, national banks would no longer be able to exist in competition with such State institutions.

[7] This was fully discussed by the writer in an article entitled "Fiduciary Powers of National Banks", 6 VA. LAW REV. 301.

One of the most important advantages over national banks which State banks and trust companies enjoyed was the power to transact a trust business in addition to the ordinary banking business. Not only was the trust business itself very profitable but their broader powers and complete facilities to handle a great variety of financial business attracted to them many customers. They also obtained the banking business of many persons with whom they came into contact in administering trusts. Many of the States had already found it necessary to permit State banks to exercise trust powers in order to meet the competition of trust companies, and for some time it had been recognized that national banks were at a distinct disadvantage in not having been granted the same privilege.

In order to compensate national banks, therefore, for the advantages gained by State banks and trust companies on being admitted to the Federal Reserve System, and in order to enable national banks to continue to exist in competition with such State institutions, Congress decided to do unto national banks as some of the States had already done as to State banks, and to permit them to exercise some of the more important fiduciary powers commonly exercised by trust companies. In carrying out this purpose, Congress authorized the Federal Reserve Board:[8]

> "To grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, or registrar of stocks and bonds under such rules and regulations as the said Board may prescribe".

When the constitutionality of that provision was questioned, the Supreme Court of the United States upheld it on the ground that Congress could confer such powers upon national banks in order to enable them to continue to exist in competition with State trust companies and State banks exercising trust powers.[9] The court further expressed the opinion that the States could not confer trust powers upon corporations which compete with national banks and at the same time deny the right of Congress

[8] Sec. 11 (k) of the original Federal Reserve Act.
[9] Bank *v.* Fellows, 244 U. S. 416.

to enable national banks to meet that competition by exercising the same powers. In pursuance of this idea, Congress amended Section 11 (k) so as to enable national banks to act not only in the capacities above mentioned but also as guardians of estates, assignees, receivers, committees of estates of lunatics, *and in any other fiduciary capacity in which competing State corporations are permitted to act under the laws of the State in which the particular national bank is located.*[10] Congress further amended the Act so as to authorize the Federal Reserve Board to permit national banks to act in these fiduciary capacities where competing State corporations are permitted to do so, even though the State law expressly forbids national banks to act in such capacities.

In view of these facts, and in view of the general language of the Act as amended, it is clear that it was the purpose of Congress in enacting Section 11 (k), and in so amending it, to put national banks upon an equality with competing State corporations so far as the exercise of fiduciary powers is concerned. That such was the purpose is further shown by the following statement by Representative Phelan who introduced the bill to amend Section 11 (k):[11]

> "We have endeavored by this amendment to make provision whereby national banks shall be *put upon precisely the same footing* with reference to these fiduciary powers, so far as that can be done by our law, with State banks, trust companies and other competing corporations."

The Act as amended, therefore, is clearly a remedial provision enacted for the purpose of broadening the powers of national banks so as to enable them successfully to meet the competition of State banks and trust companies, and it should be construed liberally in order to effect that purpose.

Competing State corporations are commonly authorized to act as transfer agents and through the exercise of this privilege obtain an advantage over national banks in their competition for commercial business. Large corporations often place their bank accounts with the banks or trust companies which act as their

[10] Act of September 26, 1918.
[11] 56 CONGRESSIONAL RECORD 5576.

transfer agents. It would seem, therefore, to be clearly within the spirit of the Act to permit national banks to act as transfer agents, and it would seem that the Act should be held to authorize them to act in that capacity if its language is reasonably susceptible to that construction.

CONSTRUCTION OF SECTION 11(K).

Obviously, the Board had no power under Section 11(k) as originally enacted to authorize a national bank to act as transfer agent; since that provision conferred upon the Board power to authorize national banks to act only in four specific capacities (as trustee, executor, administrator, and registrar of stocks and bonds), and transfer agent was not one of those four capacities. *"Expressio unius est exclusio alterius."* The Board, therefore, ruled that it had no power under the Act in its original form to authorize national banks to act as transfer agents.[12]

Section 11(k) of the Federal Reserve Act as amended by the Act of September 26, 1918, authorizes the Board:

> "To grant by special permit to national banks appying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, *or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located.*"

Inasmuch as the capacity of transfer agent is not one of the capacities specifically mentioned in Section 11(k) as amended, national banks can act in that capacity under authority of Section 11(k) only if it comes within the designation "any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located." To come within this designation it is necessary that it be (1) a "fiduciary capacity" within the meaning of Section 11(k) and (2) a capacity in which compet-

[12] 2 Fed. Res. Bulletin 456.

ing State corporations are permitted to act under the laws of the State in which the national bank is located.

The laws of many of the States expressly authorize trust companies and State banks which are in active competition with national banks to act as transfer agents. As to those States, the whole problem narrows itself down to the question whether or not transfer agents act in a "fiduciary capacity" within the meaning of Section 11(k).

MEANING OF FIDUCIARY CAPACITY.

An extensive search has failed to disclose any case in which it was decided whether or not a transfer agent acts in a fiduciary capacity. A study of the authorities, however, discloses many definitions of the terms "fiduciary", "fiduciary relation", fiduciary character", "fiduciary capacity", etc., and many cases deciding whether or not persons occupying certain positions were acting in fiduciary capacities or standing in fiduciary relations.

Upon first examination of such authorities the decisions appear to be so contradictory and conflicting as to furnish no assistance in determining the meaning of the terms but, on the contrary, to produce hopeless confusion.[13] A further study of

[13] Thus, it has been held in various different connections that the following act in fiduciary capacities or occupy fiduciary relations: *The vice president of a bank acting as general manager* (Harper *v.* Rankin, 141 Fed. 626); *a laundry agent* (Shipley *v.* Platts, 17 S. D. 357, 97 N. W. 1); *executors and administrators* (Laramore *v.* McKinzie, 60 Ga. 532; Crisfield *v.* State, 55 Md. 192; Light *v.* Merriam, 132 Mass. 283); *guardians* (*In re* Maybin, 16 Fed. Cas. 1221; Cromer *v.* Cromer, 29 Gratt. (Va.) 280); *copartners* ("There is no stronger fiduciary relation known to the law than that of a copartnership." Salhinger *v.* Salhinger, 56 Wash. 134, 105 Pac. 236); *commission merchants* (Schudder *v.* Shiells, 17 How. Prac. (N. Y.) 420, 421; *In re* Kimball, 14 Fed. Cas. 474, 2 Ben. 554); *auctioneers* (*In re* Lord, 15 Fed. Cas. 872; Jones *v.* Russell, 44 Ga. 460; overruled in Georgia R. Co. *v.* Cubbedge, 75 Ga. 321); *an agent or bailee receiving property to be used in a particular way or for a specific purpose* (Matteson *v.* Kellogg, 15 Ill. 547); *an attorney at law* (Stoll *v.* King, 8 How. Prac. (N. Y.) 298; Heffren *v.* Jayne, 39 Ind. 463, 13 Am. Rep. 281; Flanagan *v.* Pearson, 42 Tex. 1, 19 Am. Rep. 40); *an agent* (Fulton *v.* Hammond, 11 Fed. 291); *one receiving money to invest for another* (Herman *v.* Lynch, 26 Kan. 435, 40 Am. Rep. 320); *mother and son* (Hensan *v.* Cooksey, 237 Ill. 620, 86 N. E. 1107, 1109); *attorney and client, principal and agent, guardian and ward* (Meyer *v.* Reimer, 65 Kan. 822, 70 Pac. 869, 870); *the treasurer of a corporation* (Peterborough R. Co. *v.* Wood, 61 N. H. 418); *a director of a corporation* (Warren *v.* Robinson, 21 Utah 429, 61 Pac. 28); *a surviving partner* (Haggerty *v.* Badkin, 72 N. J. Eq. 473, 66 Atl. 420); *one receiving a bond to collect by suit if necessary* (Fulton *v.* Hammond, 11 Fed. 291); *a husband as trustee of his wife's separate equitable*

such cases, however, discloses the fact that they may be divided roughly into three different classes: (1) Cases in which equitable relief has been sought on the ground that the complainant has been injured through a breach of confidence and trust by one standing in a fiduciary relation; (2) cases arising under statutes authorizing the arrest of the defendant in an action for money received while acting in a fiduciary capacity; (3) cases arising under provisions of the Bankruptcy Acts excluding from discharge under those Acts debts incurred while acting in a fiduciary capacity.

EQUITY CASES.

The term "fiduciary relation" has been discussed frequently in cases where equitable relief was sought on the ground that

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estate (Donovan *v.* Haynie, 67 Ala. 51); *a tax collector* (Richmond *v.* Brown, 66 Me. 373; Grantham *v.* Clark, 62 N. H. 426).

On the other hand, in various connections, the following have been held not to have been fiduciaries or not to act in fiduciary capacities or occupy fiduciary relations: *Partners* (Gee *v.* Gee, 84 Minn. 384, 87 N. W. 1116; Inge *v.* Stillwell (Kans.), 127 Pac. 527, 42 L. R. A. (N. S.) 1093; Hill *v.* Sheibley, 68 Ga. 556); *commission merchants* (*In re* Basch, 97 Fed. 761; Duguid *v.* Edwards (N. Y.), 32 How. Pr. 254); *a broker carrying stock on a margin* (Crawford *v.* Burke, 195 U. S. 176, 190); *factors* (Zeperink *v.* Card, 11 Fed. 295; Duguid *v.* Edwards, *supra*); *pledgees* (*In re* Adler, 144 Fed. 659); *vendees in conditional sales contracts* (Bryant *v.* Kinyon, 127 Mich. 152, 86 N. W. 531, 53 L. R. A. 801); *purchasers of goods to be resold* (*In re* Butts, 120 Fed. 566); *brokers* (Stratford *v.* Jones, 97 N. Y. 586; Palmer *v.* Hussey, 119 U. S. 96); *cotton factors* (Austill *v.* Crawford, 7 Ala. 335); *attorney-in-fact* (Woodward *v.* Towne, 127 Mass. 41, 34 Am. Rep. 337); *a railroad ticket agent* (*In re* Wenham, 153 Fed. 910); *agents to make loans* (Bracken *v.* Milner, 104 Fed. 522, writ of error dismissed, 115 Fed. 1020); *a commission merchant expressly agreeing to hold the proceeds of a sale in trust* (Am. Agr. Chem. Co. *v.* Berry (Me.), 87 Atl. 218); *a creditor holding collateral for his own security* (Hennequin *v.* Clews, 111 U. S. 676); *agent to sell on any terms he chooses* (Kaufman *v.* Alexander, 53 Tex. 562); *a bailee for a specific purpose* (Phillips *v.* Russell, 42 Me. 360); *a husband acting as agent for his wife in collecting rents* (Byrnes *v.* Byrnes, 129 N. Y. 23, 29 N. E. 244); *a banker receiving a draft for collection* (Shaw *v.* Vaughn, 52 Mich. 405, 18 N. W. 126); *general agents to collect money* (Earhart *v.* Rork, 14 Ill. App. 509); *insurance agents* (Boyd *v.* Agr. Ins. Co., 76 Pac. 986); *an officer of a private corporation* (*In re* Gulick, 186 Fed. 350); *general agents to sell and collect* (Grover and Baker Sewing Mach. Co. *v.* Clinton, 5 Biss. 324, Fed. Cas. No. 5845); *an agent to procure the discount of a note* (Lawrence *v.* Harrington, 122 N. Y. 408, 25 N. E. 406); *auctioneers* (Gibson *v.* Gorman, 44 N. J. Law 325); *holders of money deposited for safe keeping* (Hervey *v.* Devereux, 72 N. C. 463); State *ex rel.* Mock *v.* Howell, 101 N. C. 443, 8 S. E. 167); *borrowers of securities* (Hennequin *v.* Clews, *supra*); *sureties* (*Ex parte* Taylor, Fed. Cas. No. 13773, 1 Hughes 617; U. S. *v.* Throckmorton, Fed. Cas. No. 16516; Jones *v.* Knox, 46 Ala. 53, 7 Am. Rep. 583; Reitz *v.* People, 72 Ill. 435; McDonald *v.* State, 77 Ind. 26; Miller

there had been a breach of confidence or trust to the injury of the complainant.

Pomeroy, in his work on Equity Jurisprudence,[14] said:

"The term 'fiduciary or confidential relation' as used in this connection, is a very broad one. It has been said that it exists, and that relief is granted, in all cases in which influence has been acquired and abused,—in which confidence has been reposed and betrayed. The origin of the confidence and the source of the influence are immaterial. The rule embraces both technical fiduciary relations and those informal relations which exist whenever one man trusts in and relies upon another. The only question is, does such a relation in fact exist?"

In Beach *v.* Wilton,[15] where a real estate man trading with a woman seventy years old was held to occupy a "fiduciary relation", Judge Carter said:

"The fiduciary relation exists between parties where there is a relation of trust and confidence between them; that is, where confidence is reposed by one party and a trust accepted by the other. * * *

"The rule embraces both technical fiduciary relations and those informal relations which exist whenever one man trusts in and relies upon another."

In Meyer *v.* Reimer[16] it was said:

"A person is said to stand in a fiduciary relation to another when he has rights and powers which he is bound to exercise for the benefit of that other person. * * *And generally, whenever, from the position of the two persons, one of them reposes and has a right to repose confidence in the other, a fiduciary relation is thereby created and exists."

And in McKinley *v.* Lynch[17] Judge McWhorter quoted Bigelow on Frauds[18] as follows:

"It is difficult to define the term 'fiduciary relation'; but it will probably be safe, without excluding other possible

v. Gillespie, 59 Mo. 220; Simpson *v.* Simpson, 80 N. C. 332; Davis *v.* McCurdy, 50 Wis. 569, 7 N. W. 665; Jones *v.* State, 28 Ark. 114; McMinn *v.* Allen, 67 N. C. 131; Eberhardt *v.* Wood (Tenn.), 6 Lea 467); *husband as to wife's paraphernal property* (Fleitas *v.* Richardson, 147 U. S. 538).

[14] Vol. 2, § 947.
[15] 244 Ill. 413, 91 N. E. 492, 495.
[16] 65 Kan. 822, 70 Pac. 869, 870.
[17] 58 W. Va. 44, 51 S. E. 4, 9.
[18] Vol. 1, p. 262.

cases, to say that such a relation arises wherever a trust, continuous or temporary, is specially reposed in the skill or integrity of another, or the property or pecuniary interest, in the whole or in part, or the bodily custody of one person, is placed in the charge of another."

It was pointed out in Studybaker *v.* Cofield [19] that:

"There are certain technical relations that are readily comprehended as fiduciary, such as guardian and ward, attorney and client, priest and communicant, etc.; but there are other relations, not falling in either of those specified classes, that are in fact, fiduciary, and conversely, it is not every guardian, attorney, etc.; *quia eo nomine* who is to be adjudged to hold a fiduciary relation with the party in regard to a particular subject. It is in each case a question of fact."

And in Smith *v.* Oglivie [20] it was explained that:

"A general definition of the word 'fiduciary' cannot well be given which is sufficiently comprehensive to embrace all cases. * * * It embraces trust, confidence and refers to the integrity, the fidelity, of the party trusted, rather than his credit or ability, and contemplates good faith rather than legal obligation."

Pomeroy sums up the situation as to the scope of the term "fiduciary relation" as used in connection with such equitable remedies as follows: [21]

"Courts of equity have carefully refrained from defining the particular instances of fiduciary relations in such a manner that other and perhaps new cases might be excluded. It is settled by an overwhelming weight of authority that the principle extends to every possible case in which a fiduciary relation exists in fact, in which there is confidence reposed on one side and the resulting superiority and influence on the other. The relation and the duties involved in it need not be legal. It may be moral, social, domestic, or merely personal."

The use of the term "fiduciary relation" in cases arising out of misrepresentations or deceits by persons standing in such re-

[19] 159 Mo. 596, 61 S. W. 246, 250.
[20] 127 N. Y. 143, 27 N. E. 807, 808.
[21] 2 POMEROY, EQUITY JURISPRUDENCE, p. 956.

lation is explained by Judge Engerud in Beare *v.* Wright [22] as follows:

> "To avoid any misapprehension from the use of the term 'fiduciary relation' in speaking of the special circumstances under which a misrepresentation as to cost or value may constitute deceit, we will say that we do not use that term in its technical sense. We apply it to any situation where trust and confidence are reposed by one party in another under such circumstances as to impose on the person trusted the obligation to act in good faith."

The meaning given to the term "fiduciary" or "fiduciary relation" in those cases is so very broad and indefinite and the nature of those cases is so different from the subject under consideration that the above definitions obviously cannot be considered as controlling the meaning to be given to the term "fiduciary capacity" as used in Section 11(k).

It is important to note, however, that the same idea seems to run through all those decisions—that, as explained in Smith *v.* Ogilvie,[23] the word "fiduciary" implies trust and confidence and relates to the integrity and fidelity of the person trusted, rather than his credit or ability, and contemplates good faith rather than mere legal obligation.

STATUTES AUTHORIZING ARREST FOR FIDUCIARY DEBTS.

The term "fiduciary capacity" has been construed also in a number of New York cases which arose under a statute authorizing the arrest of a factor, agent, broker, or other person in an action for money received in a fiduciary capacity.

One of the leading cases of this class is Stoll *v.* King.[24] In that case, after explaining that the decision necessarily depended upon the construction to be given to the words "fiduciary capacity", Justice Harris said:

> "The term 'fiduciary', as I understand it, involves the idea of trust, confidence. It refers to the integrity—the fidelity of the person trusted, rather than his credit or ability. It contemplates good faith rather than legal obligation, as the

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[22] 14 N. D. 26, 103 N. W. 632, 636.
[23] *Supra.*
[24] (N. Y.), 8 How. Prac. 298.

basis of the transaction. When an agent or attorney is employed to collect money he acts under a special trust. The money he receives is not his own. He holds it on a special trust, to pay it over to his principal. Money received under such circumstances, is received in a 'fiduciary capacity'. The principal has confided in *the man,* rather than his *ability to pay.* If he abuses that confidence the law withholds from him the privileges it confers on other debtors, and declares that he shall be liable to arrest. * * *"

After some further discussion, the learned Justice prescribed the following criterion which he considered applicable in all cases of this kind:

"* * * I think the criterion in every such case, is to determine whether the specific moneys received ought, in good faith, to have been kept and paid over to the employer; or whether the defendant, upon receiving such moneys, had the right to use them as his own, holding himself accountable to his principal for the debt thus created. In the latter case he would not be liable to arrest—in the former he would."

This criterion was quoted with approval and made the basis for the decision in Decatur *v.* Goodrich,[25] and is believed to have strongly influenced the court in a number of other cases.

In Goodrich *v.* Dunbar[26] the defendant was consignee and general charge of the ship, pay all expenses relating to her, sell agent of a ship owned by the plaintiffs. His duties were to take her and pay the expenses of the sale, and then account to the plaintiffs, *as their debtor,* for the balance he might owe them after deducting all payments previously made by him, and the balance due him from the plaintiffs on a former account. The court held that the defendant was not liable to arrest under the New York law, saying:

"The Code allows the arrest of any person for money received by any factor, agent, broker, or other person in a fiduciary capacity, (Code, Sec. 179). The term 'in a fiduciary capacity' tends to show what is meant by factor, agent, broker; viz. one in whom a trust is reposed, such as is usually reposed in those persons in their ordinary or regular business; that is, a trust that they will sell and immedi-

[25] (N. Y.), 44 Hun 3.

[26] (N. Y.), 17 Barb. 644.

> ately account for the balance after deducting their commissions; not that they shall take a general charge of their principal's business, pay various debts of theirs and assume liabilities for them and then sell their property".

In Schudder *v.* Shiells [27] it was held that a commission merchant who receives butter to sell on a commission acts in a fiduciary capacity within the meaning of the New York statute, and is liable to arrest on failure to pay over the net proceeds after the sale. Justice Campbell quoted the above language of the opinion in Goodrich *v.* Dunbar and then added the following comment of his own:

> " * * * That is, where a trust is reposed and not a credit given—where confidence is reposed in the integrity of the man rather than in his pecuniary ability."

In Obregon *v.* De Mier [28] the defendant was held liable for arrest under the New York statute where a specific sum of money was intrusted to him to be invested in a particular way. The court did not discuss the meaning of the phrase "fiduciary capacity", but took pains to point out that the "plaintiffs did not repose any trust in the *pecuniary responsibility* of the defendant, but did repose confidence in his *personal integrity*".

While the use of the term "fiduciary capacity" in the New York statute is much more similar to its use in Section 11(k) of the Federal Reserve Act than is the use of the term "fiduciary relation" in the equity cases discussed above, yet the specific enumeration immediately preceding the phrase in the New York statute—factor, agent, broker—is so different from that in Section 11(k)—trustee, executor, administrator, etc.—and the subject-matter of the two statutes is so very different, that it is believed that the actual decisions under the New York statute are of little, if any, value as precedents in construing Section 11(k).

It will be noted, however—and it is believed to be significant—that in all the cases discussed above, both the equity cases and those arising under the New York statute, the courts seem to agree that the word "fiduciary" implies trust and confidence reposed in personal integrity rather than credit or financial responsibility.

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[27] (N. Y.), 17 How. Prac. 420, 421. [28] (N. Y.), 52 How. Prac. 356.

BANKRUPTCY CASES.

The term "fiduciary capacity" has been construed most frequently in cases interpreting the Bankruptcy Acts. It originally occurred in the first section of the Bankruptcy Act of 1841,[29] which provided that, upon compliance with the requirements of that Act, "all persons whatsoever, residing in any state, territory, or district of the United States, owing debts which shall not have been created in consequence of a defalcation *as a public officer, or as executor, administrator, guardian, or trustee, or while acting in any other fiduciary capacity*", should be entitled to a discharge under the Act.

It will be noted at once that the language of the provision is strikingly similar to the language used in Section 11(k) of the Federal Reserve Act, which we are attempting to construe. In view of that fact, it would seem at first that the cases construing that provision of the Bankruptcy Act necessarily would control the construction to be given to the language of Section 11(k). Upon a study of such cases, however, it is found that the decisions were influenced largely by considerations of expediency, and by the necessity of construing the language so as to carry out the policy of the Bankruptcy Acts, which is not at all similar to the policy of the Federal Reserve Act.

The leading case involving the construction of the term "fiduciary capacity" as used in the Bankruptcy Act of 1841 was Chapman *v.* Forsyth.[30] In that case the Supreme Court of the United States held that a balance due from a mercantile factor to his principal arising out of the ordinary dealings between them was not a fiduciary debt within the meaning of that Act. Justice McLean, in delivering the opinion of the court, said:

> "The second point is, whether a factor, who retains the money of his principal, is a fiduciary debtor within the act.
> "If the act embrace such a debt, it will be difficult to limit its application. It must include all debts arising from agencies; and indeed all cases where the law implies an obligation from the trust reposed in the debtor. Such a construction would have left but few debts on which the law could

[29] Act of August 19, 1841, 5 Stat. L. 440.
[30] 2 How. 202.

operate. In almost all the commercial transactions of the country, confidence is reposed in the punctuality and integrity of the debtor, and a violation of these is, in a commercial sense, a disregard of a trust. But this is not the relation spoken of in the first section of the act.

"The cases enumerated, 'the defalcation of a public officer', 'executor', 'administrator', 'guardian', or 'trustee' are not cases of implied but special trusts, and the 'other fiduciary capacity' mentioned, must mean the same class of trusts. The act speaks of technical trusts, and not those which the law implies from the contract. A factor is not, therefore, within the act.

"This view is strengthened and, indeed, made conclusive by the provision of the fourth section, which declares that no 'merchant, banker, factor, broker, underwriter, or marine insurer', shall be entitled to a discharge, 'who has not kept proper books of accounts'. In answer to the second question, then, we say, that a factor who owes his principal money received on the sale of his goods, is not a fiduciary debtor within the meaning of the act."

It will be noted that the learned Justice did not base his decision solely on the language of the Act but was strongly influenced by the fact that "If the act embrace such a debt, it will be difficult to limit its application" and that "Such a construction would have left but few debts on which the law could operate". His conclusion was influenced also by the fact that there was a provision in Section 4 of the Act which related specifically to brokers.

At this point it may be well to remark that it has been suggested that if the term "any other fiduciary capacity" as used in the Federal Reserve Act were held to include transfer agents it would be difficult to limit its scope and it might be claimed that any ordinary mercantile agency comes within the act. As will be shown, however, transfer agents, unlike factors, may be distinguished quite easily from the ordinary mercantile agents, and act in a capacity which is very similar to one of those specifically enumerated in Section 11(k). Furthermore, under the specific language of Section 11(k), a national bank may act in only such other fiduciary capacities as competing State banks and trust companies are permitted to act under the laws of the State in which the national bank is located.

The Bankruptcy Act of 1867 [31] varied in its language from that of 1841. It provided that "no debt created by the fraud, or embezzlement of the bankrupt or his defalcation as a public officer or while acting in any fiduciary character" should be discharged. The enumeration of the specific capacities, executor, administrator, guardian, or trustee, which preceded the words "in any *other* fiduciary capacity" in the Act of 1841, and which were considered to be of such significance by Justice McLean in Chapman *v.* Forsyth, were omitted.

Under this provision it was clear that trustees of technical, special or express trusts, such as executors, administrators, guardians, etc., were not relieved by a discharge from debts or obligations incurred by them while acting in such capacities.[32] A decided diversity of opinion resulted, however, as to the status of agents, factors, commission merchants, etc. One line of decisions treated the implied trust arising from such relationships as "fiduciary" within the meaning of the Act, on the ground that the Act of 1867 was conceived in terms so much broader and more general than the Act of 1841 that there was no chance to make any difference between special and implied trusts.[33] In the other line of cases the doctrine of Chapman *v.* Forsyth was followed and the term was held to apply only to specific or express trusts and not to implied trusts.[34] The latter view is now conceded to be correct.

The corresponding provision [35] of the present Bankruptcy Act [36] reads as follows:

> "A discharge in bankruptcy shall release a bankrupt from all of his provable debts except such as * * * were created by his fraud, embezzlement, misappropriation, or defalcation, *while acting as an officer or in any fiduciary capacity.*"

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[31] Act of March 2, 1867, 14 Stat. L. 533, U. S. Rev. Stat., § 5117.

[32] Laramore *v.* McKinzie, 60 Ga. 532; Crisfield *v.* State, 55 Md. 192; *In re* Maybin, 16 Fed. Cas. 1221; Cromer *v.* Cromer, 29 Gratt. 280.

[33] Fulton *v.* Hammond, 11 Fed. 291; *In re* Kimball, 2 Ben. 554, 14 Fed. Cas. 474, affirmed in 6 Blatchf. 292, 14 Fed. Cas. 478; *In re* Seymour, 1 Ben. 348, 21 Fed. Cas. 1110.

[34] Hennequin *v.* Clews, 111 U. S. 676; Zeperink *v.* Card, 11 Fed. 295; Bracken *v.* Milner, 104 Fed. 522, writ of error dismissed, 115 Fed. 1020.

[35] Subdivision 4 of § 17.

[36] Act of July 1, 1898, 30 Stat. L. 550, Comp. Stat. '16, § 9601.

It cannot be questioned that trustees of express trusts, administrators, executors, etc., whose relations to their *cestuis que trustent* arise from express or special trusts, act in fiduciary capacities within the meaning of this provision.[37] There has been quite a contest, however, as to whether the exception is limited in its application to that class of trustees or whether it includes also trusts implied from the relation of agents, brokers, factors, etc., to their principals. It is now well settled that the term "fiduciary capacity" as used in the present Bankruptcy Act, as well as when used in the Acts of 1841 and 1867, relates only to special, technical, or express trusts and not to those trusts which the law implies from the contract between the parties, and which form an element in every mercantile agency and in a large proportion of all commercial transactions. It is confined to technical trusts, and the fiduciary character is not that which the debt gives rise to, but must exist independently of it.[38]

As intimated above, it is believed that the strict construction given to the term "fiduciary capacity" as used in the Bankruptcy Act is entirely inapplicable to that term as used in the Federal Reserve Act. While the Bankruptcy Act, like Section 11(k) of the Federal Reserve Act, is a remedial provision, yet the term "fiduciary capacity" as used in the Bankruptcy Act occurs in a provision *limiting the operation of that Act,* so that a liberal interpretation of the Bankruptcy Act as a whole requires a strict interpretation of the term "fiduciary capacity". In other words, as intimated in the opinion of Chapman *v.* Forsyth, a liberal interpretation of the term "fiduciary capacity" as used in the Bankruptcy Act would have greatly restricted the class of persons eligible for discharge under that Act. In Section 11(k) of the Federal Reserve Act, the term "fiduciary capacity" occurs in the main enabling clause which authorizes the Federal Reserve Board to confer additional powers on national banks for the purpose of enabling them to meet successfully the com-

[37] Ruff *v.* Milner, 92 Mo. App. 620; Stickney *v.* Parmenter, 74 Vt. 58, 52 Atl. 73.

[38] *In re* Basch, 97 Fed. 761; American Agricultural Chem. Co. *v.* Berry, 110 Me. 528, 87 Atl. 218; Inge *v.* Stillwell, 88 Kan. 33, 127 Pac. 527, 42 L. R. A. (N. S.) 1093; LOVELAND, BANKRUPTCY, 3d. ed., p. 846, § 294. For an excellent discussion of the many cases on this subject, see an editorial note in 42 L. R. A. (N. S.) 1093.

petition of the State banks and trust companies; and it is obvious that in order to construe that provision liberally it is necessary to give the term "fiduciary capacity" a liberal rather than a strict construction.

It should be noted, however, that the special or technical trusts which are specifically enumerated in the Bankruptcy Act of 1841, as well as those which are held to be included in the term "other fiduciary capacity" as used in the various Bankruptcy Acts, are all "fiduciary" in the sense that trust and confidence is reposed in the personal integrity or fidelity of the trustee rather than in his mere financial responsibility.

RESULTS OF STUDY OF THE CASES.

A study of the many cases in which the terms "fiduciary", "fiduciary character", "fiduciary relation", and "fiduciary capacity" have been construed discloses, therefore, that in their narrowest sense, as used in the Bankruptcy Acts, they relate only to special, technical, or express trusts, while in their broadest sense, they are applicable to every relation in which trust and confidence is reposed in the integrity and fidelity of the person trusted rather than in his credit or ability.

Inasmuch as the strict and narrow construction given to the term "fiduciary capacity" as used in the Bankruptcy Acts was induced largely by considerations of expediency and was necessary in order to give a liberal construction to that Act as a whole, the broader meaning given to the word "fiduciary" is believed to be its ordinary meaning. This is indicated by the fact that it is the meaning given by the dictionary [39] to the adjective "fiduciary":

"(1) Holding, held or founded, in trust.
(2) Of the nature of a trust; involving confidence or trust; confidential; as in a fiduciary capacity.
(3) Resting upon public confidence for value or currency; said of fiat money and the like."

It is believed, however, that no definition of the term "fiduciary capacity" could be framed which would be sufficiently com-

[39] WEBSTER, NEW INTERNATIONAL.

prehensive to embrace all cases in which it might be used and yet sufficiently restrictive to be properly applicable to any particular case that might arise. Indeed, it appears that it is a relative or generic term the precise meaning of which in any particular case depends largely upon the connection in which it is used.

THE EJUSDEM GENERIS RULE.

In order to determine the precise meaning of the phrase "any other fiduciary capacity" as used in Section 11(k), therefore, it is necessary to consider carefully the other words with which that phrase is associated—we must resort to the doctrine *noscitur a sociis.*

Referring to the text of the law, it is noted that the phrase immediately follows a specific enumeration of certain capacities in which national banks may be authorized to act, *i.e.,* trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics. This at once suggests the familiar rule of statutory construction known as the *ejusdem generis* rule—that where general words follow an enumeration of persons or things by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned.[40]

Thus, a statute which provided that "any railroad company, express company, or other common carrier, or any other person who in connection with the transportation", etc., of intoxicating liquor, shall collect the purchase price, or act as the agent of the buyer or seller, shall be fined, excludes banks, ordinary collectors, and all persons who are not members of the general class of carriers.[41] And where a statute imposed a forfeiture for forbidden acts of the goods of any "owner, importer, consignee, agent, or other person", it was held that the words "other person" did not include a stranger to the goods, but was limited to "some one of the same general class as those described by the

[40] BLACK, INTERP. LAWS, 2d. ed., p. 203.
[41] First National Bank *v.* United States, 206 Fed. 374, 46 L. R. A. (N. S.) 1139.

words with which it is associated." [42] Similarly, it was held that a statute giving a right of action for wrongful death caused by the negligence or carelessness of the proprietor, owner, charterer or hirer of any "railroad, steamboat, stagecoach, or other vehicle for the conveyance of goods or passengers" gave no right of action for wrongful death caused by the negligence of the driver of a wagon used for purely private purposes; [43] though it had been held that such statute gave a right of action for wrongful death resulting from negligence in the operation of a passenger elevator.[44]

"The particular words are presumed to describe certain species and the general words to be used for the purpose of including other species of the same genus. The rule is based on the obvious reason that if the legislature had intended the general words to be used in their unrestricted sense they would have made no mention of the particular classes. The words 'other' or 'any other' following an enumeration of particular classes are, therefore, to be read as 'other such like' and to include only others of like kind or character." [45]

Applying the doctrine of *ejusdem generis* to the case in hand, it would seem that national banks can act in only such other fiduciary capacities as are of the same general kind or class as trustees, executors, administrators, registrars of stocks and bonds, guardians of estates, assignees, receivers, and committees of estates of lunatics.

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[42] United States *v.* 1150½ Pounds of Celluloid, 82 Fed. 627.

[43] Pulom *v.* Jacob Dold Packing Co., 182 Fed. 356, 359.

[44] Farmers' & Mechanics' Nat. Bank *v.* Hanks (Tex. Civ. App.), 128 S. W. 147.

[45] 36 Cyc. 1119, quoted with approval in First National Bank *v.* United States, 206 Fed. 374, 46 L. R. A. (N. S.) 1139, 1145. The rule is further explained in 19 CORPUS JURIS 1255 as follows:

"When an author makes use, first, of terms, each evidently confined and limited to a particular class of a known species of things, and then, after such specific enumeration, subjoins a term of very extensive signification, this term, however general and comprehensive in its possible import, yet when thus used, embraces only things '*ejusdem generis*'—that is, of the same kind or species—with those comprehended by the preceding limited and confined terms. Ex. p. Leland, 1 Nott and McC. (S. C.) 460, 462; Pulom *v.* Jacob Dold Packing Co., 182 Fed. 356, 359."

APPLICATION OF ABOVE CONCLUSIONS.

Applying to the term "fiduciary capacity" its ordinary meaning, as limited by a consideration under the *ejusdem generis* rule of the words with which it is associated, it would seem necessary to reach the conclusion that in order for any particular capacity to be a "fiduciary capacity" within the meaning of Section 11(k) of the Federal Reserve Act:

(1) It must be a capacity in which trust and confidence is reposed in the integrity or fidelity of the person occupying it rather than in his credit or financial responsibility; and

(2) It must be of the same general kind or class as the capacities which are specifically enumerated in Section 11(k).

In order to determine whether the capacity of transfer agent meets these requirements, it will be necessary to examine a little more closely into the nature and functions of transfer agents. And, inasmuch as the capacity of registrar of stocks and bonds, which is one of the enumerated capacities, is very similar to and very closely connected with the capacity of transfer agent, it will be convenient to consider it at the same time.

REGISTRARS AND TRANSFER AGENTS.

As explained above, a transfer agent acts for a corporation in the matter of making transfers of the ownership of stock of the corporation from one holder to another. This involves passing upon the regularity and legality of the assignments of title, noting the transaction upon the books of the corporation, canceling the old certificates and issuing new certificates in their places.[46] A registrar of stocks and bonds registers or records the issue of certificates of stock after they have been issued by the transfer agent and his function is to prevent an over-issue of stock.[47]

In practice, the transfer agent makes the transfer and issues the new certificates. The new certificate, the old canceled certificate, and any separate proof of the right to transfer are then sent to the registrar. The registrar records the transfer by

[46] HERRICK, TRUST COMPANIES, p. 346.
[47] *Id.*, p. 358.

crediting the total authorized issue with the amount of the stock canceled and debiting securities issued and outstanding with the amount of the stock issued. The registrar then signs the new certificate which completes its execution.[48]

It is obvious that transfer agents are very similar to and very closely associated with registrars.[49] Indeed, the two capacities are so very similar that they are often confused with each other. Can it be imagined that Congress intended to authorize national banks to act as registrars of stocks and bonds but to withhold from them the right to act in the intimately related and exceedingly similar capacity of transfer agent?

REGISTRARS AND TRANSFER AGENTS AS FIDUCIARIES.

The system of having separate registrars of stocks independent of the issuing corporation resulted from a fraudulent overissue of stock by a railroad president who was also transfer agent of the corporation.[50] To guard against such frauds in the future, the New York Stock Exchange, in 1869, adopted a rule requiring all active stocks listed on the Exchange to be registered by an agency approved by it.[51] The function of a registrar, therefore, is to operate as a check upon any error or irregularity on the part of the transfer agent or the officer of the corporation issuing stock and to see that not more than the authorized amount of stock is issued.[52] In other words, when it was found unsafe to trust to the integrity of an officer of a corporation issuing stock, the investing public demanded a disinterested

[48] SEARS, TRUST COMPANY LAW, p. 134.

[49] This is further indicated by the language of many of the statutes which authorize State corporations to act in such capacities. Thus, Section 185 of the New York Banking Law (Consolidated Laws, Chap. 2, Laws of 1914, Chap. 369) authorize trust companies:

"To act as the fiscal agent of the United States, or of any state, municipality, body politic or corporation; and in such capacity to receive and disburse money, *to transfer, register* and countersign certificates of stock, bonds, or other evidences of indebtedness."

And Section 710-158 of the Ohio Banking Code (approved April 11, 1919), provides that:

"A trust company may act as agent or trustee for the purpose of *registering, countersigning or transferring* the certificates of stock, bonds, or other evidences of indebtedness of a corporation, association, municipality, state or public authority."

[50] The so-called "Schuyler Frauds", disclosed in 1863.

[51] HERRICK, TRUST COMPANIES, p. 358.

[52] *Id.*, p. 143.

third person to afford a check upon the other officers issuing the stock, and to meet this demand the office of registrar was created. In view of this fact, it would seem clear that trust and confidence is imposed in the integrity of the registrar as a disinterested third party and not in his financial responsibility—especially since the corporation issuing the stock itself is very often sufficiently responsible financially.[53]

Likewise one of the chief purposes in appointing independent transfer agents is to furnish an additional safeguard to prevent an over-issue or a fraudulent duplication of stock or any falsification of evidence as to the truth of a certificate of a share of stock or registered bond which may fall into the hands of an innocent purchaser for value.[54] This being so, it would seem that trust and confidence is reposed in the integrity of the transfer agent as well as in that of the registrar, and not merely in his financial responsibility.

Indeed, a greater measure of trust and confidence is reposed in the skill and integrity of the transfer agent than in that of the registrar. While the registrar only has to keep account of the total amount of stock outstanding and usually keeps his own private accounts and records for that purpose, the transfer agent has to possess and exercise a very high degree of skill in passing upon the regularity and legality of assignments of title to shares of stock and is necessarily intrusted with the stock books, the seal of the issuing corporation, and a supply of blank stock certificates. Both the investing public and the issuing corporation must rely upon the skill and integrity of the transfer agent in passing upon assignments of title. It is clear that the transfer agent has very important rights and powers which he is bound to exercise for the benefit of others, and all the circumstances clearly impose upon him the obligation to act in the utmost good faith.

In view of these considerations, it would seem that there can

[53] It has been held by the courts that corporations are liable for over-issues of their stock by their own properly authorized agents or officers, while the liability of independent corporate registrars and transfer agents for permitting over-issues of stock—in the absence of fraud or gross negligence—has never been finally settled and is a mooted question. See HERRICK, TRUST COMPANIES, pp. 348, 359, and authorities cited.

[54] See SEARS, TRUST COMPANY LAW, p. 129.

be no doubt that a transfer agent acts in a fiduciary capacity within the ordinary meaning of that term.

SAME GENERAL KIND OR CLASS.

Having found that transfer agents clearly act in a fiduciary capacity within the ordinary meaning of that term, it only remains to determine whether the capacity of transfer agent is of the same general kind or class as the capacities specifically enumerated in Section 11(k).

What is the general kind or class of capacities or functions which Congress had in mind when it amended Section 11(k) so as to authorize the Federal Reserve Board to grant to national banks the right to act "as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity" in which competing State banks and trust companies are permitted to act?

Remembering the language of the Bankruptcy Act of 1841, which withheld from the operation of a discharge in bankruptcy debts "created in consequence of a defalcation as a public officer or *as executor, administrator, guardian or trustee or while acting in any other fiduciary* capacity" and the now settled rule that the phrase "any other fiduciary capacity" as used in that Act relates only to the technical or special trusts, it might be argued that the phrase "or any other fiduciary capacity" as used in Section 11(k) of the Federal Reserve Act likewise relates only to technical or special trusts, were it not for the fact that the provision in which that term occurred in the Bankruptcy Act had to be strictly construed, while section 11(k) of the Federal Reserve Act must be liberally construed in order to carry out the purpose of Congress.

Furthermore, the specific enumeration in Section 11(k) includes registrars of stocks and bonds, which are not special or technical trustees, since no estate, interest, or power in or affecting property is vested in them for the benefit of others. Inasmuch as the capacities specifically enumerated in Section 11(k), therefore, do not all relate to technical or special trusts, the

phrase "or in any other fiduciary" capacity cannot be limited to that class.

The most obvious point of similarity between all the enumerated capacities is found in the fact that they are capacities in which trust companies have been acting for years,—*i.e.*, they are all well recognized trust company functions. And that this is the general kind or class of capacities or functions which Congress had in mind is verified by the fact that the very purpose of Congress in enacting the law was to enable national banks to meet the competition of trust companies by exercising those functions which gave trust companies such an advantage over national banks in competing for banking business.

Congress was not seeking to remedy a situation which existed in any one particular State, but a condition which existed generally over the country and in nearly every State of the Union. Congress, therefore, did not have in mind the powers which were enjoyed by trust companies in any one particular State, but such powers as trust companies in general commonly exercise.[55]

It cannot be disputed that the capacity of transfer agent is similar to all the enumerated capacities in that it is a capacity in which trust companies commonly act; since the laws of most of the States expressly authorize State trust companies to act as transfer agents.[56] Furthermore, the learned judge who ren-

[55] The purpose of Congress in imposing the additional limitation that national banks could exercise only such other fiduciary powers as competing State corporations are permitted to exercise under the laws of the State in which the national bank is located was to avoid offending the public policy of any State by permitting national banks within its borders to exercise any fiduciary power which it would be in contravention of State or local law for any corporation to exercise.

[56] Colorado, Act April 12, 1915, Sec. 1; Connecticut, Public Acts 1913, Ch. 194, Sec. 8, as amended; Laws of Florida, Ch. 6155, Sec. 3; Revised Code of Idaho, Sec. 5224; Bank Laws of Indiana, Chap. 3, Sec. 10; Supplement to the Code of Iowa, Title 9, Chap. 12-A, Sec. 1889d; Kansas Trust Co. Law (Gen. Stat. 1919, Ch. 23, p. 452, as amended by Ch. 34, Laws of 1911), Sec. 2; Louisiana Act 45 of 1902, Sec. 1; Maine Revised Statutes, Ch. 52, Sec. 63; Maryland Ann. Code, Art. 11, Sec. 46; Michigan Compiled Laws, Sec. 8052; General Statutes of Minnesota, 1913, Sec. 6408; Revised Statutes of Missouri, Ch. 12, Art. 3, Sec. 127; Montana Session Laws, 1915, Ch. 89, Sec. 6; N. H. Session Laws of 1915, Ch. 109, Sec. 16; New Mexico Laws, 1915, Ch. 67, Art. 3, Sec. 60; N. Y. Bkg. Law (Consolidated Laws, Ch. 2, Laws of 1914, Ch. 369), Sec. 185; Ohio Banking Code (Approved April 11, 1919) Sec. 710-158; Oregon General Laws, 1917, Ch. 197, Sec. 10; Pennsylvania Act of June 27, 1895, (P. L. 399), Sec. 1, Clause 1; South

dered the opinion in Bank of Kentucky *v.* Schuylkill Bank [57] demonstrated that as early as 1846 it was customary for banks to act as transfer agents.

CONCLUSION.

To recapitulate: Under a general permit issued by the Federal Reserve Board under section 11(k) of the Federal Reserve Act, a national bank may act in any particular capacity which is not specifically mentioned in Section 11(k), *only if*:

(1) It is a capacity which is "fiduciary" in the sense that trust and confidence is reposed in the integrity or fidelity of the person occupying it rather than in his mere credit or financial responsibility; and
(2) It is of the same general kind or class as the capacities specifically enumerated in Section 11(k)—*i. e.,* a generally recognized trust company function; and
(3) It is a capacity in which competing State corporations are permitted to act in the particular State in which the national bank is located.

These requirements are believed to be sufficient to eliminate the objection that if the capacity of transfer agent is held to be a "fiduciary capacity" within the meaning of Section 11(k), it will be difficult to limit the application of the term and that it will be necessary to construe it to include all the ordinary mercantile agencies, such as factor, broker, insurance agent, etc., as well as such capacities as surety, guarantor, and insurer. Even if the former class of capacities are "fiduciary" they are not of the same general kind or class as the capacities specifically enumerated in Section 11(k). The latter clearly are not "fiduciary", since dependence is placed only in the credit or financial responsibility of sureties, guarantors and insurers.

It has been demonstrated that the capacity of transfer agent is "fiduciary" within the ordinary meaning of that term and in the sense only that *all* the capacities specifically mentioned in the Act are "fiduciary"; and it is of the same general kind or class

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Dakota Revised Code, 1919, Sec. 9047; Texas Banking Law, Ch. 2, Sec. 16; Vt. Laws, Sec. 5347; Virginia Code, Sec. 4148; Washington Banking & Tr. Co. Laws, Sec. 36; Barnes W. Va. Code, 1916, Ch. 54C; Wisconsin Stat., Ch. 94, Sec. 2024-77k; Wyoming Session Laws, 1913, Ch. 105, Sec. 4.

[57] *Supra.*

as the capacities specifically mentioned. Giving the language of the Act its ordinary meaning, therefore, and applying the doctrine of *ejusdem generis,* it would seem necessary to reach the conclusion that the capacity of transfer agent is a "fiduciary capacity" within the meaning of Section 11(k).

It would seem, therefore, that any national bank which is located in a State in which competing State corporations are permitted to act as transfer agents and which has obtained the necessary permit from the Federal Reserve Board may act as transfer agent under authority of Section 11(k) of the Federal Reserve Act.

Walter Wyatt.

WASHINGTON, D. C.